

1-1999

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Recommended Citation

L. Darnell Weeden, *Protecting the President's Limited Expectation of Privacy During an Investigation May Justify the Protective Function Privilege for the Secret Service*, 60 Mont. L. Rev. (1999).

Available at: <https://scholarworks.umt.edu/mlr/vol60/iss1/6>

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PROTECTING THE PRESIDENT'S LIMITED EXPECTATION OF PRIVACY DURING AN INVESTIGATION MAY JUSTIFY THE PROTECTIVE FUNCTION PRIVILEGE FOR THE SECRET SERVICE

L. Darnell Weeden*

I. INTRODUCTION

The issue addressed in this article is whether members of the United States Secret Service, while acting in their official capacity of protecting the president, should be granted a protective function privilege against testifying about observations made of the president's private activities. In the recent *In re Grand Jury Proceedings*,¹ the Secret Service requested a federal district court to grant it a protective function privilege. The privilege would have permitted Secret Service agents the right to refuse to answer certain questions during depositions conducted by the Office of Independent Counsel (OIC).² Although the district court characterized the protective function privilege as a "novel one,"³ a theory for the concept may be found under Rule 501 of the Federal Rules of Evidence.⁴

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1. No. 98-148, 1998 WL 272884 (D.D.C. May 22, 1998).

2. *See id.* at *1.

3. *Id.*

4. FED. R. EVID. 501:

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State Law.

A federal court, in fact, has the discretion to create new privileges under Rule 501. The United States Supreme Court has held, however, that these privileges "are not lightly created nor expansively construed."⁵ Prior to a court creating a new privilege under Rule 501, the Supreme Court asks courts to consider (1) whether the proposed privilege has a historical basis in federal law, (2) if any state has recognized the proposed privilege, and (3) the public policy interest served by the proposed privilege.⁶

Because of the unique role of the president in our federal government, it would be difficult to recognize a protective function privilege that is based on federal legal history and widespread state support. Public policy considerations, however, may weigh strongly in favor of either a federal court or Congress recognizing the protective function privilege in order to establish the institution of presidential privacy. Even so, some federal courts have taken the position that the Supreme Court is "willing to recognize a new privilege only when the privilege had some history in federal law and enjoyed broad state support, and public policy considerations weighed strongly in favor of recognizing it."⁷

The protective function question became a highly controversial legal issue after members of the United States Secret Service refused to answer questions presented in depositions conducted by the OIC as part of a federal grand jury investigation.⁸ In urging the trial court to adopt the protective function privilege, the Secret Service outlined the nature and scope of the proposed privilege.⁹

The Secret Service argued before the district court that the proposed protective function privilege is an absolute that prohibits the OIC from requiring testimony from Secret Service agents and officers engaged in protective functions in physical proximity to the president, if the testimony would have a tendency to disclose the president's contemporaneous activities.¹⁰ The Secret Service believes that the protective function privilege should apply to the agents' or officers' observations of conduct, statements heard, and individual

5. *United States v. Nixon*, 418 U.S. 683, 710 (1974).

6. *See Jaffe v. Redmond*, 518 U.S. 1, 12-15 (1996).

7. *In re Grand Jury Proceedings*, 1998 WL 272884 at *2.

8. *See id.* at *1.

9. *See id.*

10. *See id.*

identities.¹¹ Any agent or officer not performing a protective function should not receive the benefit of the protective function privilege, according to the Secret Service.¹² Furthermore, the Secret Service takes the position that the protective function privilege is not available when the agent or officer has reasonable grounds to conclude that a felony has been, is being, or will be committed.¹³ The Secret Service concedes that the protective function privilege might not survive when compelling circumstances, such as national security, are implicated.¹⁴

Since there are several important reasons for adopting a protective function privilege for the Secret Service, I believe that either a federal court or the United States Congress should create a protective function privilege. This article includes a discussion of the historical development of the Rule 501 privilege, relevant to the protective function analysis, and an examination of the public policy issues of grand jury proceedings and partisan politics which may be well-served by an appropriate protective function rationale. I will discuss *In re: Sealed Case*,¹⁵ where the *In re Grand Jury Proceedings* decision was affirmed by the Circuit Court of the District of Columbia, with an analysis of why reasonable expectations of privacy for the president, as a person, may justify establishing the protective function privilege for the Secret Service.

My final comments will include a discussion of the appellate court's analysis of the protective function privilege and conclude that a protective function privilege rooted in privacy is necessary.

II. HISTORICAL DEVELOPMENT

A. A Historical Bias Against Expanding Testimonial Privileges

The Federal Rules of Evidence gave federal courts the ability to continue the evolutionary development of testimonial privileges in federal-criminal situations.¹⁶ The evolutionary development of testimonial privileges is "governed by the principles of the common law as they may be interpreted . . . in

11. See *id.*

12. See *id.*

13. See *id.*

14. See *id.*

15. 148 F.3d 1073 (D.C. Cir. 1998).

16. See *Trammel v. United States*, 445 U.S. 40, 47 (1980).

the light of reason and experience.”¹⁷ In enacting Rule 501, Congress demonstrated a historical intent not to “freeze” the law of privilege.¹⁸ Congress manifested a purpose to “provide the courts with the flexibility to develop rules of privilege on a case-by-case basis.”¹⁹ Although courts have the ability to create new privileges, courts are reluctant to do so because testimonial privileges go against the fundamental belief that “the public . . . has a right to every man’s evidence.”²⁰ Rule 501, in certain circumstances, may grant a witness the privilege not to testify, thus denying the public the right to a certain individual’s evidence.²¹

Trial advocacy professor Edward J. Imwinkelried takes the position that “the bias implicit in the other articles of the Federal Rules strongly favoring the admission of relevant evidence – compels the conclusion that the federal courts should exercise great caution in announcing new privileges.”²² However, the bias in favor of reliable evidence “does not derive

17. *Id.* (citing FED. R. EVID. 501; *Wolfe v. United States*, 291 U.S. 7, 12 (1934)).

18. *Id.*

19. *Id.* (citing 120 CONG. REC. 40891 (1974) (statement of Rep. Hungate)).

20. *United States v. Bryan*, 339 U.S. 323, 331 (1950).

21. See FED. R. EVID. 501 advisory committee’s notes at 3:

Article V as submitted to Congress contained thirteen Rules. Nine of those Rules defined specific non-constitutional privileges which the federal courts must recognize (i.e. required reports, lawyer-client, psychotherapist-patient, husband-wife, communications to clergyman, political vote, trade secrets, secrets of state and other official information, and identity of informer). Another Rule provided that only those privileges set forth in Article V or in some other Act of Congress could be recognized by the federal courts. The three remaining Rules addressed collateral problems as to waiver of privilege by voluntary disclosure, privileged matter disclosed under compulsion or without opportunity to claim privilege, comment upon or inference from a claim of privilege, and jury instruction with regard thereto.

The committee amended Article V to eliminate all of the Court’s specific Rules on privileges. Instead, the Committee, through a single Rule, 501, left the law of privileges in its present state and further provided that privileges shall continue to be developed by the courts of the United States under a uniform standard applicable both in civil and criminal cases. That standard, derived from Rule 26 of the Federal Rules of Criminal Procedure, mandates the application of the principles of the common law as interpreted by the courts of the United States in the light of reason and experience. The words “person, government, State, or political subdivision thereof” were added by the Committee to the lone term “witnesses” used in Rule 26 to make clear that, as under present law, not only witnesses may have privileges.

22. Edward J. Imwinkelried, *An Hegelian Approach To Privileges Under Federal Rule Of Evidence 501: The Restrictive Thesis, The Expansive Antithesis, And The Contextual Synthesis*, 73 NEB. L. REV. 511, 516 (1994) [hereinafter Imwinkelried].

from the legislative history of Rule 501 itself.”²³ According to Imwinkelried, this bias originates with friends of Rule 501, Articles IV and VI through X.²⁴ In *University of Pennsylvania v. Equal Employment Opportunity Commission*,²⁵ the United States Supreme Court stated that it was not inclined to exercise its authority under Rule 501 in an expansive manner.²⁶ Imwinkelried states, “the Court did not cite any Rule 501 legislative history discouraging the courts from expansively exercising Rule 501 powers. The point is that there is no such history.”²⁷

Professor Imwinkelried takes the position that the legislative history does not support a restrictive view of applying Rule 501. He supports the restrictive view of Rule 501 as the right result based on a contextual analysis that there is a substantive policy bias against fashioning any new privileges.²⁸ However, Imwinkelried’s historical analysis of Rule 501 does not provide any strong support for either an expansive or restrictive view of Rule 501. He suggests that a moderate-restrictive view is probably the right one to take because of the contextual nature of Rule 501.²⁹ From a historical-humanistic perspective, the privilege concept is society’s recognition of a legal right to privacy and personal dignity for an individual facing scrutiny in a legal matter. From this perspective, the humanistic value of the individual supersedes society’s interest in obtaining certain evidence about a person who is involved in a legal proceeding. In testimony during congressional hearings, constitutional law professor Charles Black, a Sterling Professor Emeritus at Yale, stated that privileges were designed to prevent the “invasion of

23. *Id.*

24. *See id.*

25. 493 U.S. 182 (1990).

26. *See id.* at 189. *See also* Imwinkelried, *supra* note 22, at 541.

27. Imwinkelried, *supra* note 22, at 542.

28. *See* Imwinkelried, *supra* note 22, at 542.

29. *See* Imwinkelried, *supra* note 22, at 542-43, where Imwinkelried writes:

Construing Rule 501 in the context of the policy bias implicit in Articles IV and VI through X, the federal courts should exercise caution in adjudicating privilege claims. This cautionary note does not sound a death-knell for privileges in general or even for novel privileges in particular. The most fundamental common-law principle codified in Rule 501 is that the courts must determine privilege claims by the method of balancing the loss of probative evidence against the social value of the extrinsic policies fostered by the privilege. That principle does not authorize, much less compel, the courts to disregard or depreciate the extrinsic social values which are the *raison d'être* of privileges.

human privacy.”³⁰ I believe Professor Imwinkelried correctly predicts that, in the long-term, the federal courts’ ethical sense of decency may shape the future of privileges.³¹

B. Historical Tension Between Executive Privilege and Testimonial Privileges

The Supreme Court has been authorized since 1934 to declare by public declaration the Federal Rules of Evidence.³² Until 1973, Congress routinely adopted proposed rules of evidence submitted to it by the Advisory Committee.³³ In 1973, however, Congress for the first time significantly modified rules proposed by the Supreme Court.³⁴ Professor Imwinkelried believes that the 1973 Congressional intervention with the Supreme Court’s proposed privilege rules was prompted by the Watergate affair.³⁵ “The Watergate affair was just beginning to unfold. The affair not only made Congress jealous of its prerogatives; Congress found itself battling the President in the federal courts over claims of executive privilege.”³⁶ It is interesting to note that a federal privilege not to testify in judicial proceedings has been a right asserted by members of the Executive Branch when confronted with the demand to testify in

30. Imwinkelried, *supra* note 22, at 544 (citing Proposed Rules of Evidence: Hearings Before the Special Subcomm. on Reform of Federal Criminal Laws of the House Com. on the Judiciary, 93d Cong., 1st Sess., 555, 557 (1973)).

31. See Imwinkelried, *supra* note 22, at 544. Imwinkelried quotes Professor Charles Black’s argument:

[S]ociety’s ethical sense of “decency” necessitates the recognition of privileges. In the long term, the federal courts’ gauge of that sense may shape the future of privileges. Relying, in the words of Rule 501, on their “reason” and “experience,” individual judges will have to assess the importance which American society attaches to that extrinsic social value. That assessment will enable the judge to adjust the Rule 501 balancing test to safeguard the freedom of citizens from invasions of privacy.

32. See Imwinkelried, *supra* note 22, at 512 (citing Federal Rules of Evidence: Hearings on H.R. 5463 Before the Senate Comm. on the Judiciary, 93d Cong., 2d Sess., 74, 76 (1974) [hereinafter Senate Hearings]).

33. See Imwinkelried, *supra* note 22, at 512 (citing H.R. DOC. NO. 46, 93d Cong., 1st Sess. (1973)).

34. See Imwinkelried, *supra* note 22, at 512. See also Senate Hearings, *supra* note 32, at 76; 23 CHARLES A. WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 5421, at 652 (1980); Jack H. Friedenthal, *The Rule-Making Power of the Supreme Court: A Contemporary Crisis*, 27 STAN. L. REV. 673, 675, 682-85 (1975).

35. See Imwinkelried, *supra* note 22, at 512.

36. Imwinkelried, *supra* note 22, at 512 (citing 2 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN’S EVIDENCE 509-3 (1993); RONALD L. CARLSON ET AL., EVIDENCE IN THE NINETIES 47 (3d ed. 1991)).

a legal proceeding. During Watergate, the confrontation over the right not to testify in a legal proceeding was between Congress and the Executive Branch.³⁷

Twenty-five years later, the confrontation over the protective function privilege not to testify in a legal proceeding is, at one level, an intra-Executive Branch battle between the OIC and the Secretary of the Department of the Treasury.³⁸ The President did not invoke the protective function privilege on his own behalf.³⁹ Rather, Robert Rubin, the Secretary of the Department of the Treasury, formally asserted the protective function privilege.⁴⁰ One could argue that the confrontation over the protective function privilege is technically an intra-attorney general battle. "When the OIC filed a motion in federal district court to compel Secret Service testimony, the Secret Service, through the attorney general, again asserted a protective function privilege, which by that time had been officially invoked by the Secretary of the Treasury, the cabinet officer who oversees the Secret Service."⁴¹ In *In re: Sealed Case*, Judge Silberman, in his concurring opinion, stated that under the Ethics in Government Act⁴² the Independent Counsel stands in

37. See Imwinkelried, *supra* note 22, at 512.

38. See *In re Grand Jury Proceedings*, No. 98-148, 1998 WL 272884, at *5 (D.D.C. May 22, 1998).

39. See *id.*

40. See *id.* The court states:

While the court declines to recognize a protective function privilege, it must note that even if so inclined, the privilege has not been properly invoked. The president has not himself invoked the protective function privilege nor has he instructed the witnesses to invoke it. Instead, Robert Rubin, the Secretary of the Department of the Treasury, has formally asserted the privilege . . . The Director of the Secret Service states that he has not consulted with the President or the White House on this issue . . . Because there is no law on the protective function privilege, the issue of who must assert the privilege is not settled.

41. *In re: Sealed Case*, 148 F.3d 1073, 1074 (D.C. Cir. 1998).

42. See 28 U.S.C. § 594(a) (1994), which states:

Notwithstanding any other provision of law, an independent counsel appointed under this chapter shall have, with respect to all matters in such independent counsel's prosecutorial jurisdiction established under this chapter, full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice, the attorney general, and any other officer or employee of the Department of Justice, except that the attorney general shall exercise direction or control as to those matters that specifically require the attorney general's personal action under § 2516 of title 18.

See *In re: Sealed Case*, 146 F.3d 1031 (D.C. Cir. 1998) (Silberman, J., concurring) for the proposition that under the Ethics in Government Act, the Independent Counsel stands in the place of the attorney general who represents the United States in any proceeding

place of the attorney general and represents the United States in any proceeding within his or her jurisdiction. The attorney general filed a petition in this case without identifying, in the caption, the party she was representing. On the first page of the brief, however, she purports to represent the United States, while the Independent Counsel's brief is also captioned as briefs for the United States.⁴³ It is analytically impossible to have two opposing lawyers before a federal appellate court representing the same named party.⁴⁴ It is a general rule of law that no party may sue itself.⁴⁵

Judge Silberman took the position that, under the legislative history of the Ethics in Government Act, no one but the OIC could litigate for the United States government a matter under investigation by the OIC without the OIC's permission.⁴⁶ In *United States v. Fernandez*,⁴⁷ the Fourth Circuit held that Congress intended for the OIC to exercise its ability to appeal a decision with independence from the attorney general and the United States Department of Justice.⁴⁸ The Ethics in Government Act limits the options that the attorney general may legally pursue in a matter under investigation by OIC.⁴⁹ Litigating against the OIC in this case as a representative of the United States is simply not an option available to the attorney general.⁵⁰

On appeal, it appears that the protective function privilege is an interesting historical intra-attorney general battle with the OIC fighting the Department of Justice.⁵¹ The Justice Department is not supposed to fight with the OIC over issues of executive privilege. The Ethics in Government Act requires the Justice Department to give assistance to the OIC.⁵² From a historical perspective, it is clear that the Executive Branch will

within its jurisdiction.

43. See *In re: Sealed Case*, 146 F.3d at 1031.

44. See *id.*

45. See *id.* See also *United States v. Interstate Commerce Comm'n*, 337 U.S. 426, 430 (1949).

46. See *In re: Sealed Case*, 146 F.3d at 1032.

47. 887 F.2d 465 (4th Cir. 1989).

48. See *id.* at 469.

49. See *In re: Sealed Case*, 146 F.3d 1031, 1033 (D.C. Cir. 1998).

50. See *id.* "In pleadings before the Supreme Court the same day that our order denying rehearing issued, the Department more forthrightly, if not more persuasively named Secretary Rubin and the Director of the United States Secret Service as the named parties." *Id.* at n.4.

51. See *id.* at 1033.

52. *Id.* at n.5. See also 28 U.S.C. § 594 (d)(1).

not concede any of its asserted privileges not to testify without a fight, whether the battle is with Congress or the OIC.

C. No Federal Protective Function History

In federal district court, the *In re Grand Jury Proceedings* court concluded that there was no federal history of a protective function privilege.⁵³ During oral argument, lawyers for the Secret Service conceded that not a single court has recognized the protective function privilege.⁵⁴ The trial court stated that there was “no constitutional basis for recognizing [a] protective function privilege,”⁵⁵ and the Secret Service did not assert that a constitutional basis does exist.⁵⁶

I believe that counsel for the Secret Service should have asserted a constitutional right of privacy as a basis for the protective function privilege. The President of the United States should enjoy a general constitutional right to privacy in the affairs of his private life. If so, recognition of the protective function privilege as a basic privacy issue could therefore help protect this general constitutional right of the president. The protective function privilege would help to permit the president to enjoy what former United States Supreme Court Justice Louis D. Brandeis once described as “the right to be let alone - the most comprehensive of rights and the right most valued by civilized men.”⁵⁷

Under federal law, the President of the United States is required to accept the protection of the Secret Service.⁵⁸ The Congress compels the president to accept Secret Service protection while remaining silent on the issue of an evidentiary

53. See *In re Grand Jury Proceedings*, No. 98-148, 1998 WL 272884, at *2 (D.D.C. May 22, 1998).

54. See *id.*

55. *Id.*

56. See *id.* at n.1.

57. *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). Justice Brandeis has been recognized for his contributions to the modern concept of the right to privacy. See Samuel D. Warren & Louis D. Brandeis, *The Right To Privacy*, 4 HARV. L. REV. 193 (1890) [hereinafter Warren & Brandeis]. The right to privacy has several meanings. This general constitutional right to privacy may have had its inception with the article written by Warren and Brandeis. See JOHN E. NOWAK ET AL., CONSTITUTIONAL LAW 684 (3d ed. 1986).

58. See 18 U.S.C. § 3056(a) (1998). “Under the direction of the Secretary of the Treasury, the United States Secret Service is authorized to protect the following persons: (1) The President, the Vice President (or other officer next in the order of succession to the Office of President), the President-elect, and the Vice President-elect.”

privilege for those protecting the president.⁵⁹ By requiring the Secret Service to be near the president at all times, Congress must have realized that Secret Service personnel would see the President's conduct and hear his communications.⁶⁰ Even so, Congress never created a protective function privilege while requiring Secret Service members to be near the president.⁶¹ The constitutional issue presented here is whether Congress can, without a showing of a compelling state interest, deny the president his constitutional right to privacy by requiring him to accept the protection of the Secret Service? The answer to that question is *no*, because Congress could protect the president's limited constitutional right to privacy with an evidentiary privilege while requiring him to accept the protection of the Secret Service.

1. Least Intrusive Means Standard to Protect Presidential Privacy Interest

Congress may not impose the protection of the Secret Service on the president's fundamental privacy interests without meeting the least intrusive means standard required under the compelling state interest test.⁶² The compelling state interest test places the burden of proof on Congress to justify an invasion into the president's fundamental privacy interest.⁶³ As in any fundamental right-to-privacy case, Congress may meet its burden by showing that the regulation serves the compelling state interest of protecting the president by the least intrusive means.⁶⁴ However, Congress has failed to demonstrate that it has used the least intrusive means in protecting the president's privacy interest while achieving the state's overriding interest in protecting the president. The least intrusive means component of the compelling state interest test shows that there is a solid constitutional basis for recognizing a protective function privilege. Arguably, the least intrusive means of invading the president's privacy interest, while requiring him to accept Secret Service protection, is to grant the protective function privilege.

59. See *In re Grand Jury Proceedings*, No. 98-148, 1998 WL 272884, at *2 (D.D.C. May 22, 1998).

60. See *id.*

61. See *id.*

62. See generally *Winfield v. Division of Pari-Mutuel Wagering*, 477 So.2d 544, 547 (Fla. 1985).

63. See *id.*

64. See *id.*

Under these circumstances, Congress, by not recognizing the evidentiary privilege, fails to meet the compelling state interest test. The compelling interest in protecting the president's life, therefore, is constitutionally flawed because of this failure.

Federal law requires all executive branch personnel to report criminal conduct by government officials to the attorney general unless the attorney general grants an exception, pursuant to 28 U.S.C. § 535(b).⁶⁵ Secret Service employees are executive branch personnel who are subject to 28 U.S.C. § 535(b), but also serve as law enforcement officers.⁶⁶ The protective function privilege based on a right of privacy rationale does not conflict with the Secret Service's law enforcement obligations under the compelling state interest test.

2. Federal District Court Concludes There Is No Congressional Intent For Protective Function Privilege

According to the federal district court, § 535(b) as well as § 3056(a) indicate that Congress did not intend a protective function privilege and, consequently, the intent of Congress is a significant factor in rejecting new privileges.⁶⁷ The federal district court was correct to conclude that Congress may create a protective function privilege if it now believes one is warranted.⁶⁸ Unlike the federal district court in *In re Grand Jury Proceedings*, I believe that the court is not only free to recognize an implied protective function privilege for the Secret Service, but courts should be required to do so in order to protect the president's fundamental right to privacy under the least intrusive means standard of the compelling state interest test.⁶⁹ The right of privacy liberty guaranteed by the due process clause gives an individual the right to enjoy those privileges long recognized under the common law as essential to the pursuit of happiness by free men.⁷⁰

65. The duty to report criminal conduct exists "unless . . . as to any department or agency of the Government, the attorney general directs otherwise with respect to a specialized class of information, allegation or complaint." 28 U.S.C. § 535(b)(2) (1994).

66. See *In re Grand Jury Proceedings*, No. 98-148, 1998 WL 272884, at *2 (D.D.C. May 22, 1998).

67. See *id.* See also *University of Pennsylvania v. Equal Employment Opportunity Comm'n*, 493 U.S. 182, 189 (1990); *United States v. Arthur Young & Co.*, 465 U.S. 805, 816 (1984).

68. See *In re Grand Jury Proceedings*, 1998 WL 272884, at *2.

69. See generally *Winfield v. Division of Pari-Mutuel Wagering*, 477 So.2d 544, 547 (Fla. 1985).

70. See *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). In *Meyer*, the court held

The constitutional right of privacy should not be denied to the president when a less intrusive means of a testimonial privilege for the Secret Service exists to allow the Secret Service to protect the president without unnecessarily intruding on the president's fundamental right to privacy.

The court, in *In re Grand Jury Proceedings*, found that the "protective function privilege has no history in federal law, but history reveals that Secret Service agents testified in judicial and non-judicial proceedings with respect to President Nixon's taping system and John Hinckley's attempted assassination of President Reagan."⁷¹ The federal district court concluded that the Secret Service's own history, the lack of constitutional or statutory support for the protective function privilege, and relevant cases under Federal Rules of Evidence 501, all weigh against creating a new protective function privilege.⁷²

D. State History and the Protective Function Privilege

No state "has ever recognized a protective function privilege or its equivalent."⁷³ The federal court, in *In re Grand Jury Proceedings*, stated "[t]he fact that every state has a governor in need of protection and that no state has ever recognized a protective function privilege provides a compelling reason for not creating the new privilege."⁷⁴ Even so, the lack of state history supporting a protective function privilege should not be conclusive or compelling for not recognizing the new privilege unless there is no less intrusive means of invading a governor or president's right to constitutional privacy.⁷⁵

III. AN EXAMINATION OF PUBLIC POLICY

Public policy may be defined as "[t]he general principles by which an organization is guided and managed."⁷⁶

unconstitutional a state law prohibiting the teaching of any language other than English in a public or private school.

71. *In re Grand Jury Proceedings*, 1998 WL 272884, at *3.

72. *See id.*

73. *Id.*

74. *Id.*

75. *See generally Winfield*, 477 So.2d at 547.

76. WILLIAM P. STATSKY, LEGAL THESAURUS/DICTIONARY 583 (1985).

A. The Protective Function Privilege May Help Grand Jury Proceedings

In addressing the public policy considerations set forth by the Secret Service, the federal district court, in *In re Grand Jury Proceedings*, stated that it was of paramount national importance to protect the physical safety of the President of the United States.⁷⁷ The Secret Service told the trial court that compelling its agents to testify before a grand jury about observations made while protecting the president would violate public policy, because current and future presidents would distance themselves from its personnel, “thereby endangering the life of the Chief Executive.”⁷⁸ The Secret Service asserted that it provides the president with a “zone of protection at all times” based on “complete and unquestioned proximity to the President.”⁷⁹ A compelled appearance by Secret Service officials before a grand jury to testify about presidential activities puts at risk their ability to have unquestioned proximity, which is necessary for the president’s safety.⁸⁰ The trial court agreed that physical proximity with Secret Service agents is necessary for the president’s safety.⁸¹ However, the court ultimately rejected the Secret Service’s argument that the fact that agents could be compelled to testify before a grand jury will lead a president to “push away” his protectors.⁸²

I advance the argument that the protective function privilege should be created so as to give the president’s protectors a limited shield to withhold evidence from a grand jury in a highly politically charged investigation. The general public policy that should guide the presidency is respect both for the law and a fair grand jury process.

When people act within the law, they do not ordinarily push away those they trust or rely upon for fear that their actions will be reported to a grand jury. It is not at all clear that a president would push Secret Service protection away if he were acting legally or even if he were engaged in personally embarrassing acts. Such actions are extremely unlikely to become the subject

77. See *In re Grand Jury Proceedings*, 1998 WL 272884, at *4.

78. *Id.*

79. *Id.*

80. See *id.*

81. See *id.*

82. *Id.*

of a grand jury investigation.⁸³

It is indeed sound public policy for all people to be guided by the principle of respect for law and justice. However, one can act within the scope of the law and push away his protectors out of fear of a perceived unfair grand jury process and or a biased OIC.⁸⁴

"The Secret Service is composed of public employees who are law enforcement officers."⁸⁵ As law enforcement officers, members of the Secret Service may appreciate better than most that the grand jury has abandoned its historical role of protecting individuals from a suspect prosecution.⁸⁶ It is quite feasible a law-abiding president will not want his protectors to testify before a grand jury because of his skeptical attitude about the role of the modern grand jury. Some commentators and courts have come to view a grand jury indictment as little more than a rubber stamp of the prosecutor's decision.⁸⁷ In California, the state supreme court has strong reservations about the role of the grand jury. "The prosecuting attorney is typically in complete control of the total process in the grand jury room; he calls the witness, interprets the evidence, states and applies the law, and advises the grand jury on whether a crime has been committed."⁸⁸

83. *See id.*

84. Judge Silberman wrote: "I am mindful of the terrible political pressures and strains of conscience that bear upon senior political appointees of the Justice Department when an Independent Counsel (or special prosecutor) is investigating the President of the United States. Those strains are surely exacerbated when the President's agents declare 'war' on the Independent Counsel." *In re: Sealed Case*, 146 F.3d 1031, 1032 (D.C. Cir. 1998) (Silberman, J., concurring).

85. *In re Grand Jury Proceedings*, 1998 WL 272884, at *5.

86. *See Wood v. Georgia*, 370 U.S. 375, 390 (1962). "Historically, this body has been regarded as a primary security to the innocent against hasty, malicious and oppressive persecution; it serves the invaluable function in our society of standing between the accuser and the accused, whether the latter be an individual, minority group, or other, to determine whether a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill will." *Id.* *See* STEPHEN A. SALTZBURG & DANIEL J. CAPRA, *AMERICAN CRIMINAL PROCEDURE CASES AND COMMENTARY* 705-706 (5th ed. 1996) [hereinafter SALTZBURG & CAPRA] for a brief discussion of whether the grand jury may still be regarded as a valid protection for citizen against the state.

87. *See* SALTZBURG & CAPRA, *supra* note 86, at 705. *See also* Andrew D. Leipold, *Why Grand Juries Do Not (and Cannot) Protect the Accused*, 80 CORNELL L. REV. 260 (1995).

88. SALTZBURG & CAPRA, *supra* note 86, at 705 (citing *Hawkins v. Superior Court*, 586 P.2d 916 (Calif. 1976)). The discussion of the grand jury states:

The pervasive prosecutorial influence reflected in such statistics has led an impressive array of commentators to endorse the sentiment expressed by United States District Judge William J. Campbell, a former prosecutor:

Public policy demands a protective function privilege for the Secret Service when it is guarding the president, because the Secret Service cannot be assured that the grand jury investigation is any more than a rubber stamp of the prosecutor's interpretation of the evidence.⁸⁹ When people act within the law they may ordinarily attempt to push away a grand jury process they do not trust to observe its historical role of protecting individuals from a perceived unfair prosecution.⁹⁰ Unlike the trial court in *In re Grand Jury Proceedings*, I do not believe that granting the Secret Service the requested protective function privilege conflicts with its duty to report criminal activity under 28 U.S.C. § 535(b).⁹¹ The protective function does not prohibit Secret Service agents from reporting any criminal activity they may observe or become aware of, it simply prevents them from having to testify when they have no independent reasonable knowledge of criminal activity by the president.⁹² The protective function privilege would simply not apply when a Secret Service agent has reasonable grounds to believe that observed actions or overheard statements, at the time of perception, were criminal acts.⁹³ The public policy argument in favor of requiring the Secret Service to protect the president's

"Today, the grand jury is the total captive of the prosecutor who, if he is candid, will concede that he can indict anybody, at any time, for almost anything, before any grand jury." Judge William J. Campbell, *Eliminate the Grand Jury*, 64 J. CRIM. L. & Criminology 174 (1973). Another distinguished federal jurist, Judge Marvin E. Frankel, put it this way: "The contemporary grand jury investigates only those whom the prosecutor asks to be investigated, and by and large indicts those whom the prosecutor wants to be indicted." MARVIN E. FRANKEL & GARY P. NAFTALIS, *THE GRAND JURY: AN INSTITUTION ON TRIAL* 100 (1977).

SALTZBURG & CAPRA, *supra* note 86, at 706.

89. See SALTZBURG & CAPRA, *supra* note 86, at 706.

90. See *Wood*, 370 U.S. at 390.

91. See *In re Grand Jury Proceedings*, No. 98-148, 1998 WL 272884, at *5 (D.D.C. May 22, 1998). Under 28 U.S.C. § 535(b) (1994):

Investigation of crimes involving Government officers and employees; limitations: (b) Any information, allegation, or complaint received in a department or agency of the executive branch of the Government relating to violations of title 18 involving Government officers and employees shall be expeditiously reported to the attorney general by the head of the department or agency, unless—(1) the responsibility to perform an investigation with respect thereto is specifically assigned otherwise by another provision of law; or (2) as to any department or agency of the Government, the attorney general directs otherwise with respect to a specified class of information, allegation, or complaint.

92. See *In re Grand Jury Proceedings*, 1998 WL 272884, at *1.

93. See *id.*

physical safety, rather than become an unintended investigative pawn of the OIC, supports the recognition of a new privacy-based testimonial privilege. The new testimonial privilege would apply to those Secret Service agents who have no reasonable basis to believe the president has engaged in any criminal activity in their official presence.⁹⁴

Sound public policy favors granting the protective function privilege to the Secret Service so that its agents will not have to wonder, when testifying before a grand jury, whether the OIC is actually investigating the man rather than the crime. In the situation involving Monica Lewinsky, a former White House Intern, and President Clinton, some have criticized Independent Counsel Kenneth Starr of investigating the man rather than the crime.⁹⁵ Critics contend that Starr began investigating the Lewinsky affair before asking for permission from the attorney general and the Special Division.⁹⁶ Without permission from either the attorney general or a special division of the court, Starr started his full-scale criminal case against Lewinsky in an effort to get her to reveal details of any alleged sexual relationship she may have had with President Clinton.⁹⁷ Some commentators think Starr pulled a fast one in investigating the Lewinsky affair by conducting the investigation prior to having authority to conduct it and then using the unauthorized evidence to get the authority to conduct the investigation.⁹⁸ Former Independent Counsel Lawrence Walsh, who spent more than seven years investigating the Iran-Contra affair, said that Starr has overstepped his jurisdiction and his proper function as an Independent Counsel by "investigating claims that arise out of private civil actions and allegations of the President's private life."⁹⁹

94. See *id.* In the federal district court the Secret Service argued that the protective function privilege would not apply to a felony.

95. See Russel M. Sowcey, Note, *The Tale Of The Omnipotent Prosecutor: How Recent Events Expose Flaws In The Supreme Court's Analysis Of The Independent Counsel Clause Of The Ethics In Government Act*, 17 REV. LITIG. 611, 631-632 (1998) [hereinafter Sowcey].

96. See *id.* See also 28 U.S.C. § 594(e) (1994): "An independent counsel may ask the attorney general or the division of the court to refer to the independent counsel matters related to the independent counsel's prosecutorial jurisdiction, and the attorney general or the division of the court, as the case may be, may refer such matters."

97. See Sowcey, *supra* note 95, at 632 (citing David Willman & Richard T. Cooper, *Clinton Under Fire*, L.A. TIMES, Jan. 24, 1998, available in 1998 WL 2391675 at *1).

98. See Sowcey, *supra* note 95, at 632.

99. See Sowcey, *supra* note 95, at 632. See also John Mintz & Toni Loly, *Starr's Probe Expansion Draws Support, Criticism*, WASH. POST, Jan. 23, 1998, available in WL

One valid public policy reason why the Secret Service may not want its agents to be compelled to testify before a grand jury where the OIC is assisting the grand jury to interpret the evidence presented against the president may be a perceived lack of impartiality on the part of the OIC. "The perceived independence of the [OIC] has come under attack. It is ironic, yet inevitable, that the Act, which was written to solve the public perception of justice achieved at highest levels . . . is now viewed as being invoked for partisan [political] reasons."¹⁰⁰ Some commentators have questioned the impartiality of federal judges who appointed the OIC.¹⁰¹

B. The Privilege Protects The Secret Service From Close Proximity To Partisan Politics

The Ethics in Government Act, designed to remove politics from the criminal process, may have actually intensified the politicization of investigation of the nation's highest-ranking official, President Clinton.¹⁰² This politicization may serve to

2463543, at *3; David Savage, *Clinton Under Fire*, L.A. TIMES, Jan. 23, 1998, available in 1998 WL 2391339.

100. Sowcey, *supra* note 95, at 637. In 1978, Congress passed the Ethics in Government Act to avoid any perceived conflict of interest such as partisan politics. See S. REP. NO. 97-496, at 6 (1982). The report stated that "[t]he intent of the special prosecutor provisions is not to impugn the integrity of the attorney general or Department of Justice. Throughout our system of justice, safeguards exist against actual or perceived conflicts of interest without reflecting adversity on the parties who are subject to conflict."

101. See, e.g., Sowcey, *supra* note 95, at n.31. "There has been much discussion of the actual impartiality of federal judges, and whether the actions of the Special Division are non-partisan connections of the judges." *Id.* (citing Ryan M. Peter, Note, *Counsels, Councils and Lunch: Preventing Abuse Of The Power To Appoint Independent Counsels*, 144 U. PA. L. REV. 2537 (1996) (discussing a rather interesting lunch of Special Division Judge David Sentelle with two conservative Republican Senators Lauch Faircloth and Jesse Helms, just before the appointment of Kenneth Starr as the new Independent Counsel. Both Faircloth and Helms had publicly expressed dissatisfaction with Robert Fiske as an Independent Counsel and wanted him replaced by Kenneth Starr)).

102. See Sowcey, *supra* note 95, at 637. See also Nancy Mathis, *Panel Studies Impeachment Inquiry Today*, HOUSTON CHRONICLE, October 5, 1998, at 1A:

Amid escalating partisan rancor, the House Judiciary Committee today begins steps toward a presidential impeachment inquiry, which its chairman hopes to complete by the end of the year. But Rep. Henry Hyde, R-Ill., expressed doubts Sunday that President Clinton will be removed from office, unless the president's level of public support changes dramatically. The judiciary panel, with 21 Republicans and 16 Democrats, opens debate today on whether to begin an unlimited impeachment inquiry of Clinton, stemming from his efforts to mislead people about his extramarital affair with former White House intern Monica Lewinsky. The vote, a formality considering the Republicans' majority membership, comes as the White House and Democrats accuse Republicans of

defeat the role of the OIC in promoting public confidence in the fairness and reliability of the results of the investigation of the president.¹⁰³ It is sound public policy for the federal courts to create a protective function privilege for the Secret Service when it is protecting the physical safety of the president. This policy is implemented in order to protect that agency from any questioned proximity to the partisan politics between the legislative and executive branches of government as well as between the Democratic and Republican political parties. The historical power struggles between Congress and the president, as well as the Republicans and Democrats, have intensified because of the OIC.¹⁰⁴ Some believe that investigations by the OIC have been an important weapon to use against the president.¹⁰⁵ The protective function privilege would serve the public well by allowing the Secret Service to avoid being caught up in these historical partisan conflicts and power struggles between Congress and the president. This conflict often times may manifest itself when an agent is compelled to appear before a federal grand jury by an OIC that is not free of political motives.¹⁰⁶

election-year partisanship. Independent Counsel Kenneth Starr has accused Clinton of perjury, obstruction of justice and abuse of office. Hyde said he expects a vote along party lines by the committee for an unlimited impeachment inquiry, despite efforts by Democrats to limit its scope and time. The House is expected to endorse the panel's inquiry later this week.

103. See Sowcey, *supra* note 95, at 637. See also Julie O'Sullivan, *The Independent Counsel Statute: Bad Law, Bad Policy*, 33 AM. CRIM. L. REV. 463 (1996).

104. See Sowcey, *supra* note 95, at 612.

105. See Sowcey, *supra* note 95, at 612. See also 28 U.S.C. § 591 (1994), originally enacted as Pub. L. 95-521 (1978). The OIC was created by Congress to prosecute wrongs by high-ranking federal officials.

106. See Bennett Roth & Gregg McDonald, *Clinton Video Causes Quarrel*, HOUSTON CHRONICLE, Sept. 16, 1998, at 1. Roth & McDonald reported:

Partisan squabbling erupted in the House on Tuesday over Republican efforts to release a videotape of President Clinton's grand jury testimony about his affair with Monica Lewinsky. Before the House votes on proceeding with an impeachment probe it must decide what evidence to release in addition to the summary that was made public last week after independent counsel Kenneth Starr delivered his report to Congress. The report contended that there is credible evidence the president committed a number of impeachable offenses from perjury to obstruction of justice. Republicans are pressing to release a video of the president's August testimony in which Starr and his prosecutors aggressively questioned Clinton on his relationship with Lewinsky. White House official's fear Republicans will use the release of the video in campaign commercials. Many Democrats believe it is wrong to make public piecemeal parts of the supporting evidence submitted by Starr. They say the original agreement called for the Judiciary Committee to review all of the material and then selectively make public pertinent information. "If we proceed in leaking

IV. AN ANALYSIS OF *IN RE: SEALED CASE*A. *Facts*

Certain officers of the Secret Service refused to answer certain questions during depositions conducted by the OIC as part of federal grand jury proceedings on the basis of an asserted protective function privilege.¹⁰⁷ After the OIC filed a motion in federal district court to compel the officers to testify, the Secret Service, by way of the attorney general, again asserted a protective function privilege.¹⁰⁸ By the time the motion to compel testimony was filed, the protective function privilege had been officially invoked by the Secretary of the Treasury, the Cabinet Officer who oversees the Secret Service.¹⁰⁹ The district court rejected the asserted protective function privilege and granted the motion to compel.¹¹⁰ The district court's decision was affirmed on appeal.¹¹¹

B. *Jurisdiction and Standard of Review*

In order to receive appellate review of a district court's order to testify, the witness must first disobey the order and be found in contempt under the general rule.¹¹² There is an exception to the general rule on appellate review when someone other than the witness holds the privilege.¹¹³ The non-witness holder may

and releasing documentation we will not have the dignified process this nation deserves," said Rep. Sheila Jackson Lee, D-Houston, a member of the Judiciary Committee, which would hold any impeachment hearings. She also warned "that we are about to begin a Salem witch hunt. I will not participate in a witch hunt." Committee members have now had an opportunity to review the tape of the president's testimony. Some said Tuesday that it would likely prove a further embarrassment to the president because it shows him "squirming" and "responding angrily" to graphic questions put to him about his sexual tryst with Lewinsky.

107. See *In re: Sealed Case*, 148 F.3d 1073, 1074 (D.C. Cir. 1998).

108. See *id.*

109. See *id.*

110. See *id.* "[W]e affirm. We note at the outset, however, that the question before the court today is whether the Secret Service officers can be compelled to testify before a federal grand jury. We express no opinion about the propriety of asserting a protective function in other legal proceedings." *Id.* In view of the appellate court's opinion it may be a viable question as to whether the protective function privilege is available in a legal proceeding called an Impeachment.

111. See *id.*

112. See *id.* See also *United States v. Ryan*, 402 U.S. 530, 533 (1971).

113. See *In re: Sealed Case*, 148 F.3d 1073, 1074 (D.C. Cir. 1998) (citing *In re Sealed Case*, 754 F.2d 395, 399 (D.C. Cir. 1985)).

appeal if "circumstances make it unlikely that [the witness] would risk a contempt citation in order to allow immediate review of a claim of privilege."¹¹⁴

The court concluded that the witnesses in this case are Secret Service agents who are also sworn law enforcement officers and that it was highly unlikely they would disobey an order to testify.¹¹⁵ Since a private company may seek an immediate appeal in order to stop an employee from testifying as to matters protected by a privilege the company wants to use, the Secretary of the Treasury may also seek an immediate appeal in order to stop Secret Service agents testifying about privileged matters that he has asserted on behalf of the United States.¹¹⁶ The court accepted jurisdiction over the protective function privilege pursuant to 28 U.S.C. § 1291.¹¹⁷ Because recognition of a testimonial privilege was a legal issue, the appellate court review was *de novo*.¹¹⁸

C. Asserted Rationale For The Protective Function Privilege Should Have Been Rooted In Privacy

The Secret Service asserted that the protective function privilege is necessary for it to carry out its statutory duty to protect the president.¹¹⁹ According to the Secret Service, the privilege is necessary because it uses protective techniques the effectiveness of which depends upon close physical proximity to

114. *Id.* "We have not hesitated to recognize that such circumstances exist when a witness has sworn under oath that he or she will testify if ordered to do so In the absence of such a sworn statement we are properly reluctant to conclude that we have jurisdiction." *Id.*

115. *See id.*

116. *See id.* *See also In re: Sealed Case*, 107 F.3d 46, 48 & n.1 (D.C. Cir. 1997).

117. *See In re: Sealed Case*, 148 F.3d at 1075. *See* 28 U.S.C. § 1291 (1994), which provides:

The courts of appeals (other than the United States of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292 (c) and (d) and 1295 of this title.

118. *See In re: Sealed Case*, 148 F.3d at 1075. It was stated in *In re Bevil, Bresler & Schulman Asset Management Co.*, 805 F.2d 120, 124 (3d Cir. 1986), "[a]lthough the applicability of a privilege is a factual question, determining the scope of a privilege is a question of law, subject to plenary review."

119. *See In re: Sealed Case*, 148 F.3d at 1075. *See also* 18 U.S.C. § 3056 (1998). *See also supra* note 57.

the president.¹²⁰ The close physical proximity to the president justification for the protective function privilege is not a very good one. The physical proximity justification is not good because it places the Secret Service agents officially protecting the president in the awkward position of appearing to refuse to testify in the context of a federal investigation or prosecution in order to help cover up evidence of criminal misconduct of the president. I believe the privacy rationale articulated by Warren and Brandeis more than one 100 years ago provides the appropriate justification for the protective function privilege.¹²¹

Political, social and economic changes entail the recognition of new rights, and the common law, in its eternal youth grows to meet the demands of society Gradually the scope of these legal rights broadened; and now the right to life has come to mean the right to enjoy life—the right to be let alone; the right to liberty secures the exercise of extensive civil privileges¹²²

Congress, by requiring the president to submit to the close physical proximity of the Secret Service in order to serve the nation's compelling state interest in prohibiting and discouraging presidential assassinations, has destroyed the president's basic *de facto* civil privacy privilege to be let alone by statute.¹²³

Federal Courts and the United States Department of Justice believe that the physical safety of the president of the United States is an issue of national importance.¹²⁴ The Department of Justice takes the position that presidential assassinations are horrible tragedies, "devastating for the country both emotionally and politically."¹²⁵ The reality of our contemporary national and international political, social and

120. See *In re: Sealed Case*, 148 F.3d at 1075. The Current Director of the Secret Service states, "it is no exaggeration to say that the difference of even a few feet between a President and his protective detail could mean the difference between life or death In a letter to the Director dated April 18, 1998, former President George Bush succinctly stated the case for recognizing the privilege: What's at stake here is the confidence of the President in the discretion of the USSS. If that confidence evaporates the agents, denied proximity, cannot properly protect the President." *Id.*

121. See Warren & Brandeis, *supra* note 57.

122. Warren & Brandeis, *supra* note 57, at 193. The "right to be let alone" language was used by Judge Cooley many years before it was used by Warren & Brandeis. See THOMAS M. COOLEY, COOLEY ON TORTS 29 (2d ed. 1888).

123. See 18 U.S.C. § 3056(a) (1998). See also *supra* note 58.

124. See *In re Grand Jury Proceedings*, No. 98-148, 1998 WL 272884, at *4 (D.D.C. May 22, 1998).

125. *Id.*

economic situation demonstrates that the president should not be let alone because physical proximity between Secret Service officers and the president is necessary for the president's protection.¹²⁶ However, in an effort to avoid presidential assassinations, the president's privacy privilege to be let alone has been eliminated by Congress through the Secret Service. The Secret Service should be allowed to assert the right not to be compelled to testify about the privacy aspects of the president's life while officially observing him in close proximity. One commentator has defined privacy as "control over who can see us, hear us, touch us, smell us, and taste us, in sum, control over who can sense us."¹²⁷

Under the above definition of privacy, the president has little or no privacy independent of the Secret Service, because the Secret Service exercises control over who can see, hear, touch, smell, taste, and sense the president in those situations involving close physical proximity to the president. The protective function privilege has its roots in one of the many descriptions of the privacy concept.¹²⁸

According to Professor Ken Gormley, after more than 100 years it is possible to conclude that definitions of privacy have clustered into four major categories.¹²⁹

First, many scholars including Roscoe Pound and Paul A. Freund viewed privacy as an expression of one's personality or personhood.¹³⁰ The protective function privilege will preclude the Secret Service from being perceived as having to comment on the president's personality. Because of the close proximity of the Secret Service to the president 24-hours a day, any

126. See *id.* "The court does not doubt that physical proximity between Secret Service personnel and the President is crucial to the President's safety." *Id.*

127. Richard B. Parker, *A Definition of Privacy*, 27 RUTGERS L. REV. 275, 280-81 (1974).

128. Ken Gormley, *One Hundred Years of Privacy*, 1992 WIS. L. REV. 1335 (1992) [hereinafter Gormley]. In this article, Professor Gormley argues that scholars have been unable to agree upon a one-size-fits-all definition of legal privacy because it actually consists of distinct species:

- The Privacy of Warren & Brandeis (Tort Privacy)
- Fourth Amendment Privacy
- First Amendment Privacy
- Fundamental Decision Privacy
- State Constitutional Privacy.

129. See *id.* at 1337.

130. See *id.* See also Roscoe Pound, *Interests of Personality*, 28 HARV. L. REV. 343 (1915); Paul A. Freund, *Address to the American Law Institute* (May 23, 1975), quoted in 52 A.L.I. PROC. 574-75 (1975).

compelled testimony by Secret Service agents is likely to be viewed by the general public as Secret Service agents defining the president's essence as a human being.

In the second cluster, some scholars view privacy as autonomy to protect the moral liberty of people to engage in their own thoughts, actions and decisions.¹³¹ The president's self-autonomy is always compromised because the Secret Service must maintain the ability to observe his actions at all times. Because the president is not free to reject the Secret Service's intrusion into his right of autonomy, the protective function privilege should exist to respect the president's limited de facto right of autonomy.

A third cluster characterized privacy as the ability to regulate information about oneself with the goal of controlling this relationship with other people.¹³² The protective function privilege would allow the Secret Service to control the information about the president it deemed necessary in an investigation by the OIC. One essential element of regulating privacy-based information about the president is trust. In the tradition of privacy, "[t]he Secret Service has a tradition and culture of maintaining the confidences of its protectees."¹³³

A fourth cluster of scholars has broken privacy into three essential elements of secrecy, anonymity and solitude.¹³⁴ Professor Gormley states that commentators have stumbled over privacy because of a focus on privacy as a philosophical or moral issue while ignoring privacy as a legal concept.¹³⁵ I believe that the privacy-based protective function privilege can be justified as a legal, moral or philosophical necessity.¹³⁶

The appellate court states that unless otherwise prohibited,

131. See Gormley, *supra* note 128, at 1337. See also Louis Henkin, *Privacy and Autonomy*, 74 COLUM. L. REV. 1410, 1425 (1974); Joel Feinberg, *Autonomy, Sovereignty, and Privacy: Moral Ideas in the Constitution?*, 58 NOTRE DAME L. REV. 445 (1983).

132. Warren & Brandeis, *supra* note 57. See also ALAN F. WESTIN, *PRIVACY AND FREEDOM* 7 (1967); Charles Fried, *Privacy*, 77 YALE L.J. 475, 477-78 (1968); Hyman Gross, *The Concept of Privacy*, 42 N.Y.U. L. REV. 34, 35-36 (1967). "Privacy is the condition of human life in which acquaintance with a person or with affairs of his life which are personal to him is limited." *Id.* (emphasis omitted).

133. *In re: Sealed Case*, 148 F.3d 1073, 1075 (D.C. Cir. 1998).

134. Gormley, *supra* note 128, at 1338 (quoting Ruth Gavison, *Privacy*, 89 YALE L.J. 421, 433 (1980)).

135. Gormley, *supra* note 128, at 1339.

136. See Milton R. Kovitz, *Privacy and the Law: A Philosophical Prelude*, 31 LAW & CONTEMP. PROBS. 272 (1966) (discussing the nexus between the right of privacy and theology); MARGARET MEAD, *COMING OF AGE IN SAMOA*, 82-85 (1949) (stating that privacy has achieved universal recognition in all societies).

Federal Rules of Evidence 501 provides that the privilege of a witness shall be governed by the common law in the light of reason and experience.¹³⁷ A continued and evolutionary development of testimonial privilege under common law principles requires a court to recognize the protective function privilege. That an individual shall have full privacy protection in his or her person "is a principle as old as the common law."¹³⁸ An expansive reading of Rule 501 under the spirit of the common law would have dictated the recognition of the protective function privilege in order to protect the integrity of the president's privacy as a person. Under the common law "it has been found necessary from time to time to define anew the exact nature of such [privacy] protection."¹³⁹ Unlike the United States Supreme Court, it appears that the lower court views Rule 501 as freezing or almost freezing the law governing the privileges of witnesses in federal court.¹⁴⁰ Although the Supreme Court has given a great deal of weight to federal and state precedent when recognizing a privilege, the appellate court correctly concludes that it does not regard the absence of precedent as weighing heavily against the recognition of the protective function privilege.¹⁴¹

One reason the appellate court rejected the Secret Service's argument was because protectors of state governors do not have a protective function privilege. The court determined that this is a significant factor in not recognizing the privilege at the presidential level.¹⁴² It was conceded by the court that analogies can be drawn to state governors and their protectors; however, the consequences of assassinations are so much greater at the presidential level, the analogies provide little guidance for demonstrating a lack of precedent for the protective function privilege.¹⁴³ The protective function privilege was rejected, but

137. FED. R. EVID. 501; *see also supra* note 4.

138. Warren & Brandeis, *supra* note 57, at 193.

139. Warren & Brandeis, *supra* note 57, at 193.

140. *See Jaffe v. Redmond*, 518 U.S. 1, 9 (1996). Rule 501 "did not freeze the law governing privileges . . . in [our] history, but [Rule 501] directed federal courts . . . to continue the evolutionary development of testimonial privileges." *Id.*

141. *See In re: Sealed Case*, 148 F.3d 1073, 1076 (D.C. Cir. 1998). "[T]he OIC makes much of the lack of relevant federal or state precedent for the protective function privilege. The lack of such precedent is hardly surprising, however, in view of the novelty of the OIC's demand for testimony: This appears to be the first effort in U.S. history to compel testimony by agents guarding the President." *Id.*

142. *See id.*

143. *See id.*

not because there was a lack of precedent for recognizing such a privilege.¹⁴⁴

Judicial recognition of the privilege depends entirely upon the Secret Service's ability to establish clearly and convincingly both the need for and the efficacy of the proposed privilege. In other words, the Secret Service must demonstrate that recognition of the privilege in its proposed form will materially enhance presidential security by lessening any tendency of the president to "push away" his protectors in situations where there is some risk to his safety.¹⁴⁵

Again, the argument that the protective function privilege is needed because it will make it less likely that the president will "push away" protectors in situations where there is some risk to his safety is a flawed argument. The "push away" argument is flawed because no rational president will knowingly materially decrease his or her security in situations where there is some increased risk to his or her safety.

I believe the protective function privilege is needed because it will materially enhance presidential privacy and not place the president's protectors at risk of destroying the president's privacy in the absence of a compelling circumstance. In analyzing the appellate court decision it is my "purpose to consider whether the existing law affords a principle which can properly be invoked to protect the privacy of the individual."¹⁴⁶

The protective function privilege should be recognized by the federal courts or created by Congress because when it comes to the private right to enjoy life, the president is just an individual. Warren and Brandeis were correct to conclude that the right to privacy has come to mean the right to be let alone to enjoy life.¹⁴⁷ However, unlike other individuals, the individual who happens to be President of the United States, as the price of public service, is denied the basic privacy right to enjoy a private life. Unlike other individuals, the president may not be let alone because he has a duty by operation of law to accept the protection of the Secret Service.¹⁴⁸ Because federal law does not

144. *See id.*

145. *Id.*

146. Warren & Brandeis, *supra* note 57, at 197.

147. *See* Warren & Brandeis, *supra* note 57, at 193.

148. *See In re: Sealed Case*, 148 F.3d 1073 (D.C. Cir. 1998). "[A]lthough we must acknowledge that the Secret Service has a duty to protect the President, we must also consider that the President has a correlative duty to accept protection." *Id.* at 1077. *See also* 18 U.S.C. § 3056(a), (d) (1998).

allow the president any privacy from his protectors, federal courts should allow his protectors to protect his privacy from all others, out of respect for the president's spiritual nature, feelings and intellect in the absence of a compelling state interest. According to Warren and Brandeis, the law has given a recognition to man's spiritual nature, to his feelings, his intellect as well as the right to be let alone.¹⁴⁹ After more than 100 years, Warren and Brandeis' basic characterization of privacy as simply the right to be alone is still valid.¹⁵⁰ The question we may have forgotten to ask is what aspect of our lives involves the right to be let alone.¹⁵¹ In 1890, the right to be let alone included the right not to disclose information to newspapers and prying photographers.¹⁵² For subsequent generations of Americans the right to be let alone applies to a totally different aspect of their lives.¹⁵³ The meaning of the right to be let alone is dictated from generation to generation by history.¹⁵⁴

In *In re: Sealed Case*, the appeals court stated that a party trying to establish a new evidentiary privilege under Rule 501 must show with a high degree of clarity and certainty that the proposed privilege will effectively promote a public good.¹⁵⁵ In order to establish a new Rule 501 privilege, the Supreme Court generally requires the proponent to come forward with an empirical necessity for the privilege.¹⁵⁶

I believe that the Secret Service's ability to protect the privacy of the president is a transcendent public good, which justifies the protective function privilege. Profound public interest is served when the Secret Service is granted the protective function privilege to protect the president's privacy interest against unnecessary speculation and gossip. Gossip and speculation are likely to follow any appearance by a Secret

149. See Warren & Brandeis, *supra* note 57, at 193.

150. See Gormley, *supra* note 128, at 1342.

151. See Gormley, *supra* note 128, at 1342.

152. See Gormley, *supra* note 128, at 1342.

153. See Gormley, *supra* note 128, at 1342.

154. See Gormley, *supra* note 128, at 1340-41. "Since privacy is a creature of American history, it is impossible to predict with any precision new permutations of this right, any more than one can predict the events of American history itself." *Id.*

155. See *In re: Sealed Case* 148 F.3d at 1076. See *United States v. Gillock*, 445 U.S. 360, 373 (1980), where a proposed state legislative privilege was rejected as based on speculation.

156. See *In re: Sealed Case* 148 F.3d at 1076 (quoting *Branzburg v. Hayes*, 408 U.S. 665, 693-94 n.32 (1972) (finding that "[e]stimates of the inhibiting effect of [grand jury] subpoenas on the willingness of informants to make disclosure to newsmen are widely divergent and to a great extent speculative"))).

Service agent before a grand jury.

Warren and Brandies argued more than 100 years ago that privacy was needed to protect a person from gossip in the press.¹⁵⁷ Under the circumstances surrounding the OIC investigation of the president, the press is overstepping the bounds of decency by printing gossip.¹⁵⁸ "To satisfy a prurient taste the details of sexual relations are spread broadcast in the columns of the daily newspapers."¹⁵⁹ The OIC, in fact, acknowledges the profound public interest in the president's physical safety.¹⁶⁰ I agree with the conclusions of Warren and Brandies that an invasion upon a person's privacy may subject him to mental pain and distress far greater than what can be inflicted by mere bodily injury.¹⁶¹

Since privacy violations in certain circumstances may cause more harm than mere physical injury, I think I have shown with compelling clarity under Rule 501 that failure to recognize the proposed privilege will jeopardize the ability of the Secret Service to effectively protect the president's privacy interest against the mental pain and distress of gossip. "Each crop of unseemly gossip, thus harvested, becomes the seed of more, and, in direct proportion to its circulation, results in a lowering of social standards and of morality. Even gossip apparently harmless, when widely and persistently circulated, is potent for evil. It both belittles and perverts."¹⁶²

According to columnist William Shapiro, these days in Washington, "the center of gossip can be found at lunch-time on the strip of Pennsylvania Avenue between the White House and 18th Street."¹⁶³ At the Breadline sandwich shop, "harried White House aides and hyperactive reporters" share the latest gossip and predictions about Bill Clinton's fate because of the Monica Lewinsky scandal.¹⁶⁴ At lunch at the Breadline, Shapiro and an old friend who works at the White House quickly began to engage in gossip about "what-did-you-know-and-when-did-you-

157. See Warren & Brandeis, *supra* note 57, at 196.

158. See Warren & Brandeis, *supra* note 57, at 196.

159. See Warren & Brandeis, *supra* note 57, at 196.

160. See *In re: Sealed Case*, 148 F.3d at 1076.

161. See Warren & Brandeis, *supra* note 57, at 196.

162. See Warren & Brandeis, *supra* note 57, at 196.

163. Walter Shapiro, *The View From D.C. is too Close to Call*, USA TODAY, Sept. 25, 1998, at 2A.

164. *Id.*

know-it best featuring an ever-shifting cast.”¹⁶⁵

The protective function privilege is needed to protect the Secret Service from becoming victim of speculation and gossip about why the OIC has subpoenaed its agents to testify before the grand jury. It is my conclusion that those entrusted with the responsibility for safeguarding the president are entitled to a protective function privacy privilege based upon a realistic appraisal of the danger and fears associated with the Secret Service being identified with gossip and speculation about the president's private life in the absence of a compelling circumstance. There is a universal understanding in America that this nation has a profound interest in the security of the president.¹⁶⁶ It is now time for the courts to recognize that, as between the Secret Service and the president, the nation has a profound interest in protecting the president from mental pain and suffering caused by gossip and speculation when the president's protectors are compelled to testify before a grand jury about the president's private affairs.

The rationale for the protective function privilege as articulated by the Secret Service is weak also because the president cannot know whether an agent realizes he is witnessing the commission of a felony by the president.¹⁶⁷ Under the contemporaneously recognized felony exception to the proposed Secret Service protective function privilege, the president has an incentive to push away his protectors anytime he or she perceives that his non-criminal conduct may be perceived as a felony.¹⁶⁸ The president's privacy interest is not above the law, but evidence of crimes committed by the president must come from sources independent of Secret Service agents, unless those agents recognized the conduct as criminal when witnessing it. The protective function privilege based on the privacy rationale is not designed to impede the search for truth, but to promote limited privacy for the president as an individual because he has no *de facto* privacy with the Secret Service. I believe prosecutors in future investigations of presidents for evidence of crime, will have enough independent

165. *Id.*

166. *See In re: Sealed Case*, 148 F.3d 1073, 1076 (D.C. Cir. 1998).

167. *See id.* at 1077.

168. *See id.* “An agent may not testify about the conduct of the President or anyone else unless the agent recognizes that conduct as felonious when he is witnessing it; a felony made apparent to the agent only by subsequent events—and any misdemeanor, regardless of the circumstances—must remain secret.” *Id.*

sources to establish a case without impairing presidential privacy by compelling Secret Service officers to testify before the grand jury at the request of the OIC.

The court of appeals properly criticized the Secret Service for not attempting to protect its articulated physical-safety, close-proximity, protective function privilege rationale by requiring agents to sign confidentiality agreements as a condition of employment.¹⁶⁹ In order to protect the Secret Service's interest in protecting the president's privacy interest, I believe it is necessary for all Secret Service agents to sign confidentiality agreements.¹⁷⁰ A protective function privilege rooted in respect for presidential privacy will not be undermined by being vested in the Secretary of the Treasury, and not in the president, because a privacy based privilege unlike the safety-based privilege proposed by the Secret Service is designed to influence the behavior of the president's protectors and investigators rather than the president.¹⁷¹ The appellate court correctly stated that the safety-based protective function privilege does not reasonably advance its goal because a president may distance himself from Secret Service agents when engaging in wrongful conduct, as might a simple desire for privacy at other times.¹⁷² Under my proposed privacy-based protective function privilege coupled with a required confidentiality agreement, it will not be necessary or proper for a president to distance him or herself from the protectors in the name of privacy.

V. CONCLUSION

I agree with the appellate court's conclusion that the Secret Service failed to meet its burden under Rule 501 of establishing the need for a safety-based protective function privilege.¹⁷³ However, Rule 501 does allow for a privacy based protective

169. *See id.*

170. *See id.* "If preventing testimony is as critical to the success of its mission as the Secret Service now claims, it seems anomalous, that the service has no better mechanism in place to discourage former agents from revealing confidences or at least to alert the Secretary when testimony is about to be given." *Id.*

171. *See id.* The appellate court concluded that efficacy of the safety based protective function privilege "is undermined by its being vested in the Secretary of the Treasury and not in the President, whose conduct the proposed privilege is supposed to influence." *Id.*

172. *See id.* at 1078.

173. *See id.* at 1079.

function privilege based on the president's *de facto* right to be let alone. Because the president does not have a legal right to be let alone, it is necessary that Rule 501 be construed so as to provide the president's protectors with the ability to assert the president's privacy interest in order to promote the public good. The protective function privilege based on a privacy interest in the right to be let alone should be recognized in spite of the fact that the value of the right to be let alone does not always lend itself to useful empirical information.¹⁷⁴ The protective function privilege is needed to insure the privacy of the president by either congressional action or under a necessary and proper common law reading of the goal of Rule 501.

The common law justification for a privacy based protective function privilege is supported by the tradition of Warren and Brandies, that all individuals including the president shall benefit from a privacy principle as old as the common law.¹⁷⁵

174. See *id.* at 1078-79. See also Swidler & Berlin v. U.S., 118 S. Ct. 2081, 2088 (1998) (stating that "[i]n an area where empirical information would be useful, it is scant and inconclusive").

175. See Warren & Brandeis, *supra* note 57, at 193.